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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Placer)

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JOHN H. GEWALT, Individually and as Trustee, etc.,

Plaintiff, Cross-defendant and  
Appellant,

v.

VICTORIA M. GEWALT, as Trustee, etc., et al.,

Defendants, Cross-complainants and  
Respondents.

C077972

(Super. Ct. No. SCV0028016)

The Gewalt family owned substantial real property in Louisiana. When disputes arose regarding management of the property and related assets, John Gewalt and another family member sued for breach of fiduciary duty and fraud, among other things.

The named defendants filed a cross-complaint. After years of litigation the parties settled by signing a memorandum of agreement, specifying that the agreement was enforceable under Code of Civil Procedure section 664.6,<sup>1</sup> which provides a summary procedure for enforcement of settlement agreements. The trial court granted defendants' section 664.6 motion and entered judgment in favor of defendants.

Representing himself on appeal, John now contends the trial court erred in entering judgment because (1) the agreement was not intended to be a final settlement, (2) paragraph 2.4 of the agreement cannot be specifically enforced, (3) paragraph 2.5 of the agreement is not sufficiently certain, (4) defendants did not engage in the dispute resolution process required by the agreement, and (5) John rescinded the agreement because his consent was given by mistake.

Finding no error, we will affirm the judgment.

#### BACKGROUND

Brothers Charles and John Gewalt formed CD&G Limited Partnership (CD&G), Houlton Investment Company (Houlton), and LSP Minerals to hold and manage real property and related assets located in Louisiana. We will refer to members of the Gewalt family by their first names for clarity. InterTeam, Inc. (InterTeam) was one of the partners of Houlton. After Charles died, disputes arose about the management of the properties and related assets. The specific details of the various business arrangements and disputes are not relevant to the contentions on appeal. It is sufficient to explain that John, individually and as trustee of the Carl & Ruth Gewalt Grandchildren's Trust (Grandchildren's Trust), and his daughter Colby, a beneficiary of the Grandchildren's Trust, sued Charles's estate, Victoria (Charles's widow), individually and as trustee of the Charles and Victoria Gewalt Revocable Trust (CVG Trust), and Gre/Vin/Ken Limited

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure.

(GVK Limited), an entity formed by Charles, for breach of fiduciary duty, breach of contract, fraud, aiding and abetting breach of fiduciary duty, restitution, and accounting. Defendants cross-complained against John and Colby for breach of contract, accounting, trespass, conversion, breach of fiduciary duty, indemnity and intentional infliction of emotional distress.

The parties settled the matter at mediation with a private mediator, the Honorable John K. Letton (ret.), and signed a memorandum of agreement. The agreement was between John, Colby, defendants, LSP Minerals, Vincent Panigazzi (Victoria's son), and John's wife Jeanne, with the following signatures on the agreement: (1) John; (2) Jeanne; (3) Colby (by her attorney-in-fact); (4) GVK Limited (by its managing member, Victoria); (5) the administrator of Charles's estate; (6) Victoria; (7) Panigazzi (by his attorney-in-fact); and (8) LSP Minerals (by its general partners, John and Victoria).

The parties to the agreement agreed to settle all disputes and to release all claims between them arising out of the facts alleged in the complaint and cross-complaint on the terms and conditions set forth in the agreement. The agreement included provisions relating to mineral rights, the identification of all remaining properties held in Louisiana, appraisal and partition of jointly owned properties, and dissolution of CD&G and Houlton, along with a Civil Code section 1542 waiver. The litigants agreed to file notices of conditional settlement of the complaint and cross-complaint indicating they would execute a formal settlement agreement within 20 days, and a dismissal with prejudice of the entire action after the execution of a formal settlement agreement. Victoria agreed to ask the sheriff of Tangipahoa County in Louisiana to dismiss a criminal matter against John and to take all steps reasonably necessary to effectuate the dismissal of those charges.

The parties further agreed the agreement was binding and could be enforced pursuant to section 664.6, even though the agreement would be more thoroughly documented in a formal settlement agreement.

Following the execution of the agreement, the parties filed notices of a conditional settlement. Defendants timely sent to John's counsel their list of remaining properties, but John did not provide a property list by the stipulated deadline and the parties did not prepare a more formal settlement agreement. Defendants informed John's counsel they did not require any change to the agreement and they would file a section 664.6 motion. In response, John's attorney sent an untimely list of properties but said he did not know what information the list depicted. Defendants' counsel objected that John's list was not of currently owned properties, but defendants continued efforts to identify current mineral rights leases and a potential mineral rights agent.

Defendants also proposed potential appraisers. After the time indicated in the agreement for the execution of a more formal settlement agreement had passed, defendants asked John if he wanted any modifications to the agreement and if he objected to defendants' property list. John did not propose any addition to the agreement and he did not respond to defendants' proposed appraisers. Defendants' counsel informed John's counsel that, having received no response about defendants' proposed appraisers, defendants selected Joseph Mier & Associates as the appraiser. There was no response to the e-mail from defendants' counsel.

Defendants then filed a section 664.6 motion to enforce the agreement. Defendants and Colby thereafter dismissed the complaint and cross-complaint between them with prejudice, but John opposed defendants' section 664.6 motion. He asserted that Victoria misrepresented that she was authorized to do the following: sign the agreement on behalf of Charles's estate, CD&G, Houlton and LSP Minerals; dissolve CD&G and Houlton; and act on behalf of GVK Limited when that entity was not in good standing and had been converted to a limited liability company without approval of CD&G's surviving partner. John sought to rescind the agreement.

The trial court granted defendants' motion and entered judgment. It found the terms of the agreement were sufficiently certain and complete to enforce. Finding no

admissible or credible evidence establishing a defense to enforcement, it denied John's request for rescission.

We note that John's appellant's reply brief references certain purported facts and documents that are not in the record. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 (*Nwosu*).) For example, the appellate reply brief references the provisions of a 1983 Agreement to Enter into Partnership, a 2005 Act of Donation, and the articles of incorporation for GVK Limited. We do not consider purported facts and documents that are not in the record on appeal. When an appellant fails to provide an adequate record on an issue, we must resolve the issue against the appellant. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609; *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 657.)

## DISCUSSION

### I

John contends the agreement was not intended to be a final settlement. Defendants respond that John forfeited his claim by not raising it in the trial court.

In general, issues not presented in the trial court may not be raised on appeal. (*Sanchez v. Truck Ins. Exchange* (1994) 21 Cal.App.4th 1778, 1787 (*Sanchez*); *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 648 (*Robinson*).) “ ‘It is the general rule that a party to an action may not, for the first time on appeal, change the theory of the cause of action. [Citations.] There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. [Citation.] But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.’ [Citation.]” (*Krechuniak v. Noorzoy* (2017) 11 Cal.App.5th 713, 725.)

In opposition to defendants' section 664.6 motion, John argued the agreement must be rescinded because his consent to it was obtained by Victoria's misrepresentations about her authority to act on behalf of Charles's estate, CD&G, Houlton, LSP Minerals and GVK Limited. John did not argue in the trial court that the agreement was not a final agreement. Whether the parties to the agreement intended it to be a final and enforceable agreement is a factual question. (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 308 (*Harris*)). "It is for the trial court to determine in the first instance whether the parties have entered into an enforceable settlement. [Citation.] In making that determination, 'the trial court acts as the trier of fact, determining whether the parties entered into a valid and binding settlement. [Citation.] Trial judges may consider oral testimony or may determine the [section 664.6] motion upon declarations alone. [Citation.]" (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.) Whether there was a final and binding agreement was not litigated in, and decided by, the trial court and cannot be raised for the first time on appeal. (*Sanchez, supra*, 21 Cal.App.4th at p. 1787; *Robinson, supra*, 57 Cal.App.4th at p. 648.)

In any event, our review of the record does not support John's factual assertion. Paragraphs 4 and 6 of the agreement state that the parties agreed the agreement was binding and could be enforced pursuant to section 664.6. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1300 (*Provost*) [provision in settlement agreement that it " 'is binding on the parties' " indicates mutual consent and intent to be bound].) In support of the section 664.6 motion, defense counsel Shauna Correia averred that the parties intended the agreement to be binding and enforceable. Although the parties left open the possibility that after further contemplation, additional details consistent with the terms of the agreement might be added, John and Colby did not request additional details consistent with the agreement after defendants gave notice that they were satisfied with it. The declaration John submitted in opposition to the section 664.6 motion did not dispute the averments by Ms. Correia.

## II

John next claims paragraph 2.4 of the agreement cannot be specifically enforced because it was not signed by CD&G, Houlton, InterTeam, Victoria in her individual capacity, or Colby and Vincent personally.

Section 664.6 requires a writing “signed by the parties.” The California Supreme Court has held the requirement means the litigants -- i.e., the specific person or entity by or against whom legal proceedings are brought -- themselves must sign the agreement to settle. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583-586 (*Levy*)). This is because the settlement of a lawsuit ends litigation and implicates a substantial right of the litigants; therefore, it requires the knowledge and express consent of the litigants. (*Id.* at pp. 583-584.) In *Levy*, the defendant could not enforce a settlement agreement under section 664.6 against a plaintiff who did not sign the agreement. (*Levy*, at pp. 580, 586; see *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1257-1260; *Gauss v. GAF Corporation* (2002) 103 Cal.App.4th 1110, 1118-1121; *Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 33-35, 37.) Section 664.6 requires “the signatures of the parties seeking to enforce the agreement under section 664.6 and against whom the agreement is sought to be enforced.” (*Harris, supra*, 74 Cal.App.4th at p. 305, see *id.* at pp. 303, 305-306.)

Victoria, individually and as trustee of the CVG Trust, is a party to the agreement. It appears that Victoria signed the third signature block on page 11 of the agreement. Although the document does not specify in what capacity she signed the signature block, John did not raise the issue in the trial court, and Victoria did not have an opportunity to respond to the contention by presenting evidence about the third signature block on page 11 of the agreement. Accordingly, John’s appellate claim regarding Victoria’s signature is forfeited because it concerns a disputed factual issue not presented in the trial court. (*Sanchez, supra*, 21 Cal.App.4th at p. 1787; *Robinson, supra*, 57 Cal.App.4th at p. 648.)

Colby and Vincent did not personally sign the agreement. There are also no signatures by CD&G, Houlton and InterTeam. But Vincent, CD&G, Houlton and InterTeam are not litigants in this matter, and John does not cite authority for the proposition that section 664.6 requires non-litigants to sign an agreement to settle litigation. (Contra *Levy, supra*, 10 Cal.4th at p. 586 [term “ ‘parties to pending litigation’ ” in section 664.6 means litigants].) Claims made without legal analysis and citation to authority are forfeited. (*Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045, fn. 1 (*Okasaki*); *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656 (*Keyes*).)

Although she is a litigant, Colby did not seek to enforce the agreement and did not oppose its enforcement. She dismissed her complaint with prejudice. A settlement agreement may be enforced under section 664.6 by the parties who signed it, but the statute does not require the signature of every party to the action who benefits from the settlement agreement. (*Provost, supra*, 201 Cal.App.4th at pp. 1298-1299.)

### III

John further argues paragraph 2.5 of the agreement is not sufficiently certain. Although this claim was not raised in the trial court, we will nevertheless consider it because whether a settlement agreement is sufficiently certain is a question of law. (*Provost, supra*, 201 Cal.App.4th at p. 1301; *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, 1141.)

Paragraph 2.5 of the agreement provides: “After the partition of all Jointly Owned Real Property, the parties agree to take all steps necessary and appropriate under Louisiana law to dissolve CD&G and HOULTON. Defendants agree to assign the rights to the name ‘Houlton Investment Company’ and ‘Lake Superior Piling Company’ to Plaintiffs. Plaintiffs agree that Defendants shall be entitled to maintain all existing names of subdivisions and shall not be required to change title or other existing marketing materials related thereto. Plaintiffs agree to assign the rights to the name ‘Superior Land’ to Defendants.” Paragraph 6 of the judgment recites the provisions of paragraph 2.5 of

the agreement and adds: “The Parties are hereby ordered to comply in all respects with this provision to dissolve CD&G . . . and Houlton . . . .”

A settlement agreement “is enforceable if it is sufficiently definite that a court can ascertain the parties’ obligations thereunder and determine whether those obligations have been performed or breached.” (*Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 268.) In determining whether the material terms of “a contract are sufficiently certain for specific performance, the modern trend of the law favors carrying out the parties’ intention through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty. [Citations.] The defense of uncertainty has validity only when the uncertainty or incompleteness of the contract prevents the court from knowing what to enforce. [Citations.]” (*Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 500, fn. omitted.)

The parties agreed to dissolve CD&G and Houlton, and the trial court ordered them to do that. The agreement to “take all steps necessary and appropriate under Louisiana law” to accomplish the dissolution required them to cooperate and do what was needed to dissolve the partnerships. (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1093 [implied covenant of good faith and fair dealing required party “to do everything that the contract presupposes that [it] will do to accomplish its purpose.”]; see generally *Okun v. Morton* (1988) 203 Cal.App.3d 805, 820 [the law implies in every contract a covenant of good faith and fair dealing which prohibits the parties from doing anything which will deprive the other of the benefits of the agreement].) When the parties agreed to dissolve CD&G and Houlton in accordance with Louisiana law they impliedly agreed to do everything to accomplish that result and to refrain from doing anything that would impair the right of the other party to receive the benefits of their contract. John describes some of the steps necessary under Louisiana law to dissolve the partnerships, but he fails to demonstrate any fatal uncertainty in paragraph 2.5.

John also challenges a sentence in paragraph 7 of the agreement as not sufficiently precise. That sentence reads: “Plaintiffs agree to indemnify and hold harmless Defendants from and against any and all claims that Colby Gewalt has brought or could have brought as beneficiary of the in [sic] this Litigation.” Although there appears to be a typographical error in the sentence, paragraph 1.12 of the agreement describes the complaint and cross-complaint and paragraph 1.13 of the agreement indicates the parties agreed to settle all disputes and release all claims which did or might exist between them. The complaint alleged Charles breached his fiduciary duties as co-trustee of the Grandchildren’s Trust by taking improper actions regarding property belonging to the Grandchildren’s Trust. The cross-complaint alleged Charles and John, as co-trustees of the Grandchildren’s Trust, terminated the trust and distributed its assets in 2000. Charles’s three children received half of the trust assets, and a promissory note payable to Colby for the other half of the trust assets was assigned to John because Colby was then a minor. Defendants sought indemnity from John for any liability to Colby based on claims she brought or could have brought as beneficiary.

In light of those allegations, the parties agreed that any real property once belonging to the Grandchildren’s Trust had been distributed to Charles and John equally and that Charles and John were supposed to satisfy all remaining obligations to the beneficiaries. The challenged sentence granted defendants the indemnity they sought in their cross-complaint. John’s challenge to the sentence lacks merit.

John further objects that paragraph 7 provides no concrete steps for the parties to take regarding another sentence that reads: “The parties agree and reaffirm all prior agreements with respect to [the Grandchildren’s Trust] remain in full force and effect.” John’s challenge fails because the sentence merely maintains the status quo, it does not contemplate any “steps” for future action.

#### IV

John contends defendants did not engage in the dispute resolution process required by the agreement. In deciding a section 664.6 motion, a trial court may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment. (*In re The Clergy Cases I* (2010) 188 Cal.App.4th 1224, 1236.) However, a trial court may not create the material terms of a settlement, it may only interpret the terms upon which the parties agreed. (*Ibid.*) We examine the language of paragraph 2.1 to ascertain and give effect to the mutual intent of the parties. (*Leeman v. Adams Extract & Spice, LLC* (2015) 236 Cal.App.4th 1367, 1374.)

#### A

John's first argument pertains to paragraph 2.1 of the agreement, which provides: "The parties agree to exercise best efforts to identify all remaining properties held in Louisiana once held by Lake Superior Piling Company, and attempt to come to agreement with regard to the properties held severally by John H. Gewalt, Charles D. Gewalt, or jointly by John H. Gewalt and Charles D. Gewalt, CD&G or HOULTON, or their successors and assigns. The parties will exchange those lists within twenty (20) days. If either party disputes the percentage ownership of any particular parcel, the parties agree to split the cost of an abstract of title. If the parties cannot resolve the dispute based on the abstract, the parties agree to submit the dispute to mediation before Judge Letton. If mediation fails to resolve the dispute, the parties agree to submit the dispute to Arbitration under the California Arbitration Act rules. The prevailing party in any arbitration shall be entitled to prevailing party attorney's fees and costs associated with such Arbitration. [¶] All properties identified as the separate property of either John H. Gewalt or his successors or assigns, or Charles D. Gewalt or his successors or assigns, shall be and remain his separate property." The judgment deemed defendants' list of properties to be the final list because John failed to timely comply with the provisions of paragraph 2.1.

In paragraph 2.1 the parties agreed to exchange lists identifying all remaining Louisiana properties held by various individuals and entities by September 11, 2014, and defendants timely complied. Substantial evidence supports the trial court's finding that John did not timely comply with the requirement. Defendants asked the trial court to accept defendants' list as the list of remaining properties. While John now raises a belated challenge to defendant's property list, his opposition to the section 664.6 motion did not challenge defendants' assertion of his noncompliance or disagree with the information in defendants' list. Because John raised no dispute about the ownership of any parcel, there was no basis to resort to the dispute resolution procedures in paragraph 2.1, such as obtaining an abstract of title or engaging in mediation or arbitration. He fails to establish trial court error.

## B

John further argues the trial court did not follow the dispute resolution procedure set forth in paragraph 2.2 of the agreement pertaining to appointment of an appraiser. He explains that if the parties could not agree on an appraiser they were to submit names of potential appraisers to the mediator. But once again, the record does not establish a dispute justifying utilization of the dispute resolution procedure. The record shows that defendants proposed appraisers but John did not; John did not indicate lack of agreement, he did not timely object, and in fact he did not timely respond. John's challenge lacks merit.

## V

John further argues he rescinded the agreement because his consent was given by mistake.

The grounds for rescission are set forth in Civil Code section 1689. A party to a contract may rescind a contract if his or her consent was given by mistake. (Civ. Code, § 1689, subd. (b)(1).) "Mistake is said to fall generally into two categories: (1) A person may know the specific facts upon which his rights depend but be ignorant of the rules of

law the courts will apply to those facts, or (2) a person may know the applicable legal rules but be mistaken as to the specific facts to which the rules are to be applied.” (*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 884-885, fn. omitted; see Civ. Code, § 1578 [a mistake of law is a mistake which arises from a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law or a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify].)

Finding no admissible or credible evidence establishing a defense to enforcement, the trial court denied John’s request for rescission. Nevertheless, John once again asserts various reasons why his consent to the agreement was given by mistake.

He begins by claiming Victoria lacked authority to sign the agreement on behalf of LSP Minerals because Charles transferred his interest in LSP Minerals to the CVG Trust in 2005, in violation of paragraph 12.1 of the LSP Minerals Articles of Partnership. John claims there was a “bilateral mistake of law” but fails to explain how the record establishes a misapprehension of the law regarding Charles’s transfer of his interest in LSP Minerals which was shared by all parties. If John claims the misapprehension of the law concerns a misinterpretation of the LSP Minerals Articles of Partnership, he fails to cite any portion of the record supporting his claim of a mutual mistake. John also fails to explain how the 2005 transfer violates paragraph 12.1 of the LSP Minerals Articles of Partnership. We are not required to examine undeveloped claims. (*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 984-985; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

In his appellant’s reply brief, John claims Charles did not bequeath a partnership interest in LSP Minerals to Victoria. The belated claim, made without citation to the record, is forfeited. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10 (*Garcia*); *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8

(*Neighbours*); *Nwosu, supra*, 122 Cal.App.4th at p. 1246.) John also argues in his reply brief that pursuant to paragraph 13.1 of the LSP Minerals Articles of Partnership, LSP Minerals was terminated upon Charles's death. But John does not explain how the asserted fact constitutes a misapprehension of law by the parties which would warrant rescinding the agreement.

John also contends Victoria lacked authority to sign the agreement on behalf of GVK Limited because she converted it into a limited liability company. However, Victoria signed the agreement as a managing member of GVK Limited, a limited liability company. John does not explain in his appellant's opening brief why the conversion of GVK Limited to GVK Limited, LLC resulted in Victoria's lack of authority to sign the agreement. It is John's responsibility to support his claims of error with legal analysis. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Keyes, supra*, 189 Cal.App.4th at p. 656.) His failure to do so forfeits his appellate claim. (*Okasaki, supra*, 203 Cal.App.4th at p. 1045, fn. 1.)

John raises additional new claims in his appellant's reply brief. He argues GVK Limited was not properly formed as a corporation and Victoria could not act for GVK Limited after Charles's death; the assignment of GVK Limited to the GVK Trust did not comply with the articles of incorporation; and the agreement contains various errors and omissions and his counsel did not participate in drafting the agreement. We reject the new claims presented in the reply brief because they were not timely raised and there is no showing of good cause for the delay in raising them. (*Garcia, supra*, 16 Cal.4th at p. 482, fn. 10; *Neighbours, supra*, 217 Cal.App.3d at p. 335, fn. 8.) The new claims also involve factual questions not presented in the trial court. (*Sanchez, supra*, 21 Cal.App.4th at p. 1787; *Robinson, supra*, 57 Cal.App.4th at p. 648.)

John has not established mistake undermining the agreement. Paragraph 12 of the agreement states it was prepared by the settling parties and their attorneys. Paragraph 13 says the parties carefully read and understood the agreement and received legal advice

from attorneys of their choice concerning the preparation, review and advisability of signing the agreement. Further, each party acknowledged signing the agreement after independent investigation. John signed the agreement, indicating his agreement with the statements therein. His claim of rescission lacks merit.

## DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.  
(Cal. Rules of Court, rule 8.278(a).)

/S/  
MAURO, Acting P. J.

We concur:

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HOCH, J.

/S/  
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 RENNER, J.